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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-191

FRANK L. PETERMAN,
Petitioner,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

The District Court's Order of October 9, 1973 Denying Defendant's Motion for Judgment n.o.v. and Granting a New Trial Was Not an Appealable Order.

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Authorities

Jackson v. Wilson Trucking Corp., 243 F2d 212, 71 **Harvard Law Review** (1958), 33 **Notre Dame Law Review,** 216 (1957);

State Farm Mutual Auto, Inc. v. Hinds, C.A. Ala. 1960, 277 F2d 4441;

Moore's Federal Practice, Vol. 5(a), ¶ 50.16.

II

The District Court's Order of July 25, 1974 Entering Judgment Against the Defendant Was the Final Judgment, and Was an Appealable Order. Defendant's Notice of Appeal Was Filed Within Thirty Days of That Order. In Addition, Defendant's Letter of July 11 (a copy of which was sent to the Clerk of the Court of Appeals within thirty days of the filing of the mandate) Constituted Adequate Notice of Appeal.

Authorities

Donovan v. Esso Shipping Co., 259 F2d 65;

Fitzsimmons v. Yeager, 391 F2d 849;

Foaman v. Davis, 371 US 178, 83 S. Ct. 227, 9 L. Ed. 2d 222, on remand 316 F2d 254;

Graves v. Gen. Ins. Corp., 281 F2d 517;

Holz v. Smullan, 227 F2d 58.

III

In the Alternative, the District Court's Order of July 25, 1974 Clarified by Its Order of August 9, 1974 Constituted the Granting of a Thirty-Day Extension of Time for Appeal, Pursuant to Rule 4(a) of the F.R.A.P., and Rule 60(b) of the F.R.C.P.

Authorities

C-Thru Prods., Inc. v. Uniflex, Inc., 397 F2d 952;

Pasquale v. Finch, 418 F2d 627 (1969);

Torockio v. Chamberlain Mfg. Co., 456 F2d 1084;

Federal Rule of Appellate Procedure 4(a).

IV

The District Court in the First Instance Had Jurisdiction to Grant a New Trial and the Court of Appeals Also Had Such Power Under the Federal Rules of Appellate Procedure.

Authorities

F.R.A.P. 50(d);

Jackson v. Wilson Trucking Corp., 243 F2d 212 (C.A. D.C. 1957);

Slaughter v. Philadelphia National Bank, 12 FR. Serv. 59d.3 (U.S.D.C., E.D. Pa. 1968);

Moore's Federal Practice, ¶ 51.11;

See Respondent's Petition for Writ of Certiorari, From Mandate of Court of Appeals, Filed on or About April 29, 1974.

Respondent prays that this Court refuse to grant a Writ of Certiorari to review the opinion and judgment filed March 3, 1974 of the United States Circuit Court of Appeals for the Eighth Circuit.

Throughout this Brief, Petitioner Peterman will be referred to as the plaintiff, and the Rock Island Railroad as the defendant, to avoid confusion among the various appeals and Petitions for Writs of Mandamus and Certiorari.

STATEMENT OF THE CASE

1. On July 19, 1973 the Jury in the United States District Court for the Southern District of Iowa, returned its verdict in favor of the plaintiff in a railroad crossing collision case on the basis of last clear chance after having found in answer to a special interrogatory that plaintiff was guilty of negligence which was a proximate cause of the collision.

2. Within ten days defendant filed its Motion for Judgment n.o.v.

3. On hearing, the Court gave notice to the parties that it was considering granting a new trial *sua sponte* and requested Briefs. The Court, on October 9, 1973, denied Defendant's Motion for Judgment n.o.v., but ordered a new trial stating "It would not be fair or in the interest of justice to grant a judgment n.o.v." under the circumstances.

4. On November 7, 1973 plaintiff moved to set aside the Order granting a new trial, and on December 5, 1973 this Motion was overruled.

5. On January 2, 1974, more than sixty days after the Order granting a new trial, plaintiff petitioned the Court of Appeals for a Writ of Mandamus.

6. On March 15, 1974 the Court of Appeals granted the Writ of Mandamus, holding that the Trial Court had exceeded its jurisdiction in ordering a new trial.

7. After Defendant's Petition for Writ of Certiorari to this Court was denied, the Court of Appeals gave notice on June 19, 1974 that its mandate would be sent to the Clerk of the District Court. Defendant's counsel received a copy of the notice, but did not receive a copy of the mandate.

8. Within thirty days of June 19, 1974 defendant's counsel had a telephone conference with the Deputy Clerk of the United States District Court in Des Moines, who advised defendant's counsel that a copy of the judgment would be forwarded when filed. It was not filed or forwarded.

9. On July 11, 1974, defendant's counsel replied to plaintiff's counsel's letter of July 2, stating it would appeal, with a copy to the Clerk of the District Court. (Appendix).

10. On July 24, 1974, defendant moved for entry of judgment and in the alternative for an extension of time for filing Notice of Appeal under F.R.A.P. 4(a). This was within the second thirty-day period following the filing of the mandate of the Court of Appeals.

11. On July 25, 1974 the District Court entered its Order reinstating the judgment.

12. On August 2, 1974, eight days thereafter, defendant filed its Notice of Appeal to the Court of Appeals.

13. On August 9, 1974 the District Court entered its Order holding that "defendant's failure to file Notice of Appeal within thirty days following the issuance of the mandate on July 18, 1974" constituted excusable neglect, and exercised "its discretion under Rule 60(b) to extend the time for filing Notice of Appeal."

14. On October 23, 1974, defendant filed its Brief on the merits in the Court of Appeals. Thereafter, on or about November 11, 1974 plaintiff filed a Motion to Dismiss the appeal, which was overruled on the hearing on the merits.

Defendant contends that its appeal was timely. However, this matter may also be disposed of on the ground that defendant's appeal was allowed by the District Court within the second thirty-day period following the issuance of the mandate by the Court of Appeals, as allowed by the Rules.

ARGUMENT

I

The Court's Order of October 9, 1973 Denying Defendant's Motion for Judgment N.O.V. and Granting a New Trial Was Not an Appealable Order.

The Order of the Court of October 9, 1973 denying defendant's Motion for Judgment n.o.v. and granting a new trial was not an appealable Order. All of the authorities cited under Issue I so hold. As the Court said in *State Farm Mutual Auto, Inc. v. Hinds*, supra:

> "PER CURIAM.
>
> "This attempted appeal from an order denying defendant's motion for judgment notwithstanding the verdict, but granting its alternative motion for a new trial is not an appeal from a final decision of which this Court has jurisdiction. 28 U.S.C.A. 1291; Ford Motor Co. v. Busam Motor Sales, 6 Cir., 1950, 185 F.2d 531; Balicki v. Central Greyhound Lines, Inc., 3 Cir., 1945, 150 F.2d 402. The appeal is therefore
>
> "Dismissed."

Moore's Federal Practice, Vol. 5(A), ¶50.16 states:

> "¶50.16. *Appealability as Affected by Ruling on Motions.* Denial of a motion for judgment n.o.v. is not an appealable order; the appeal should be taken from the entry of judgment on the verdict. Where the trial court *denies* a motion for judgment n.o.v. but grants a motion to set aside the verdict, to vacate any judgment entered thereon and for a new trial, there is no judgment to appeal from. If an appeal were entertained it would be a futility because the Order for a new trial, which may be on various grounds

not relating to the legal sufficiency of the evidence, is not ordinarily reviewable, and the case would have to be sent back to a new trial irrespective of what the appellate court might find as to the legal sufficiency of the evidence."

Plaintiff asserts that the Order of the Court of October 9, 1973 granting a new trial was absolutely void and that, therefore, the defendant if it wished relief should have appealed from the Order denying the judgment n.o.v. Notwithstanding the statement of the Court of Appeals in its Order on Petition for Writ of Mandamus, defendant submits that Judge Stuart's Order of October 9, 1973 was merely voidable. Defendant could not have been charged with notice that it was void and there was a legitimate controversy, supported by respectable authority that the District Court did have jurisdiction to enter such Order. (See: Dissent of Judge, now Chief Justice Burger, in *Jackson v. Wilson Trucking Corp.*, 243 F2d 212, 71 *Harvard Law Review* (1958); 33 *Notre Dame Law Review*, 216 (1957).)

If the plaintiff had not filed its Petition for Writ of Mandamus or appealed, Judge Stuart's Order would have become a finality. The Order was, in fact, originally entered to give relief to the plaintiff from the harsher judgment of granting the Motion for Judgment n.o.v. After the entry of the Order, plaintiff's foot-dragging in filing a further Motion to Set Aside the Order of the Court caused the expiration of any time to appeal from the Order of October 9.

The defendant chose to accept the remedy of a new trial at that stage, feeling that the Order was not appealable under the authorities above cited. To now hold that defendant was charged with notice that Judge Stuart's Order was void and of no effect and to hold that it was required then and there to appeal would be now to deny the defendant its right of appeal on the merits and work a substantial injustice.

Plaintiff urges that defendant was required to appeal within thirty days of the original judgment of July 19 and not having done so may not now obtain relief under F.R.C.P. 60, as more than one year has passed since the date of that judgment.

As defendant has pointed out, it would be grossly unfair to rule that its time for appeal ran from that date, instead of from the date of the mandate of this Court of June 19, 1974, or the Order of the Court reinstating the judgment of August 9, 1974. Nevertheless, plaintiff overlooks the fact that Rule 60(b)(6) states the Court may relieve a party from a final judgment for "*any other reason* justifying relief from the operation of judgment", and that this relief is not limited to the one-year period required of the other reasons for relief set forth in that Rule. (emphasis supplied)

II

The Court's Order of July 25, 1974 Entering Judgment Against the Defendant Is the Final Judgment, and Is an Appealable Order. Defendant's Notice of Appeal Was Filed Within Thirty Days of That Order.

It is the general rule that only final judgments are appealable. It was thus the feeling of defendant's counsel that after the issuance of the mandate by this Court on the Petition for Mandamus, it was necessary for the District Court to enter an Order reinstating the judgment. This feeling was confirmed by a conversation with a Deputy Clerk of the District Court, and shared by the Court in its Order of July 25, 1974. That was the appealable Order.

However, even if the appeal time ran from June 19, 1974, the defendant took the proper steps for an extension of time, which was granted, as more fully appears in Brief Point III below.

In fact, defendant's letter to plaintiff's counsel of July 11, 1974 (Appendix), a copy of which was sent to the Clerk of the United States District Court at Davenport, Iowa, was in itself adequate Notice of Appeal. It was written and filed with the Clerk within the thirty-day period from the date of the filing of the mandate. This letter stated: "It is our intention to appeal from the judgment when filed, and we will file a supersedeas bond promptly."

That this letter is sufficient, see: *Graves v. Gen. Ins. Corp.*, 381 F2d 517; *Holz v. Smullan*, 277 F2d 58; *Donovan v. Esso Shipping Co.*, 259 F2d 65; *Fitzsimmons v. Yeager*, 391 F2d 849; *Foaman v. Davis*, 371 US 178, 83 S. Ct. 227, 9 L. Ed.2d 222, on remand 316 F2d 254.

Plaintiff has never been misled as to defendant's intentions in this matter.

III

In the Alternative, the Court's Order of July 25, 1974 Clarified by Its Order of August 9, 1974 Constitutes the Granting of a Thirty-Day Extension of Time of Appeal, Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure, and Rule 60(b) of the Federal Rules of Civil Procedure.

This controversy is easily disposed of by reading the last paragraph of F.R.A.P. 4(a) and applying it to the facts revealed by the record. That paragraph states:

> "Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but

> if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

The record shows that the mandate of this Court was filed in the Office of the Clerk of the District Court on June 19, 1974. Assuming that defendant's time for appeal ran from that date, it had until July 20 to file its Notice of Appeal.

On July 24, 1974, four days after the expiration of the thirty days, defendant filed its Motion for Entry of Judgment and in the Alternative for an Extension of Time for filing Notice of Appeal under Rule 4(a). The Court entered judgment on that Motion on July 25, reinstating the original judgment. In its Order of July 25, the Court stated that it "assumed that the opinion and judgment directed the issuance of a formal Writ of Mandamus, and has not to this date entered an Order in accordance with said judgment or opinion. Having now been assured that the mandate previously issued is sufficient," the Court ordered judgment entered.

This is the Order which the defendant urges it has the right to appeal from, as set forth in Issue II herein.

However, defendant's Notice of Appeal was filed on August 2, 1974, within the second thirty-day period contemplated by F.R.A.P. 4(a). It specifically requested the relief based on excusable neglect required by F.R.A.P. 4(a). This excusable neglect consisted of counsel's belief, reinforced by a conversation with a Deputy Clerk, that a formal judgment would be entered by the Court after the mandate was filed. This belief was apparently shared by the Court.

In ruling upon Plaintiff's Motion to Set Aside its judgment, which was filed after the Notice of Appeal, the Court in its Order of August 9, 1974 stated: "The confusion as to whether further action by the Trial Court was necessary to start the time

for appeal running was sufficient excuse for defendant's failure to file Notice of Appeal within thirty days following the issuance of the mandate on July 18, 1974. As the supersedeas bond adequately protects plaintiff's judgment from possible insolvency of the defendant and the Court favors disposition of the issues on their merits, the Court would exercise its discretion under Rule 60(b) to extend the time for filing a Notice of Appeal, if it has the authority to do so." That the Trial Court has such authority is clear from a reading of F.R.A.P. 4(a), as well as F.R.C.P. 60(b), without further reference to authorities.

Nevertheless, the authorities cited under Issue III above are clear that the Court does have this authority and in some instances it has been allowed *nunc pro tunc*, even after the expiration of the sixty days.

The Court of Appeals did not go that far in this case, as defendant's Motion for Extension under F.R.A.P. 4(a) was filed four days after the expiration for time for appeal (if the time, in fact, expired thirty days after the filing of the mandate).

In *C-Thru Prods., Inc. v. Uniflex, Inc.*, supra, the Second Circuit allowed relief where the motion was filed *after* expiration of the sixty-day period. The Court there said:

> "We reject the contention that the appeal is barred as untimely. The amended judgment was filed July 24, 1967. Notice of appeal and bond were filed September 20, 1967, with a motion to grant additional time to file the appeal. Affidavits and memoranda on the motion were filed by defendant September 29 and plaintiffs on October 2. Hearing was had on October 4, decision rendered October 10, an order extending time on a sufficiently supported finding of excusable neglect was entered October 25, and an order that the notice of appeal filed September 20 be deemed timely filed, was entered November 2.

"Appellee contends that Rule 73, setting the time for appeal at 30 days and permitting extension of time for not more than an additional 30 days on a showing of excusable neglect, must be strictly construed to require that the showing must be made and order entered within the 60-day period following entry of the judgment from which appeal was taken. Such an interpretation would be unduly harsh and contrary to the spirit and purpose of Rule 73 as in effect in 1967. The time limitation is intended to set a period on which the parties may rely for required action by a litigant, not to dragoon a busy trial court into hasty and ill-considered action by the risk of destruction of appellate rights if the court does not meet the fixed deadline. We may note in this case appellee took nine days, extending over the expiration of the sixty-day period, to respond. On September 20 appellee was on timely notice so that it might take whatever steps were needed to prepare to resist the appeal. Appellants' action was timely, and the court's ruling effective. Compare Evans v. Jones, 366 F.2d 772, 773 (4 Cir. 1966)."

In *Torockio v. Chamberlain Mfg. Co.*, supra, the Third Circuit went even further, stating:

"The case will be remanded to the district court for consideration of a motion, to be promptly filed, pursuant to Fed.R.App.P. 4(a) to approve *nunc pro tunc* the filing of a notice of appeal on July 28, 1971, and for such other proceedings as the district court may find appropriate."

In *Pasquale v. Finch*, supra, the First Circuit stated:

"* * * we agree with the view of the government, the district court, and the Second, Fourth, and Sixth Circuits that the district court was not required to make its ruling on the government's motion within the 30-day period after May 12. C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952,

954-955 (2d Cir. 1968); Evans v. Jones, 366 F.2d 772, 773 (4th Cir. 1966); Reed v. People of the State of Michigan, 398 F.2d 800, 801 (6th Cir. 1968); see Reconstruction Finance Corp. v. Prudence Group, 311 U.S. 579, 582, 61 S.Ct. 331, 85 L.Ed. 364 (1941)."

There was no need in this instance to remand the matter to the District Court to find whether or not there was "excusable neglect," for the District Court has already so found in its Order of August 9, 1974.

Here the Motion for Extension of Time under F.R.A.P. 4(a) was not filed after the expiration of sixty days, as in the cases above cited, but within the second thirty-day period, as allowed by the Rule. The formal Notice of Appeal was also filed within the second thirty-day period.

IV

The District Court in the First Instance Had Jurisdiction to Grant a New Trial and the Court of Appeals Also Had Such Power Under the Federal Rules of Appellate Procedure.

Plaintiff asserts that Rule 59(d) of the F.R.C.P. does not authorize the Court of Appeals to order a new trial where the appellant has unsuccessfully sought a judgment n.o.v. Plaintiff overlooks the final clause of Rule 59(d) which authorizes the granting of a new trial by the Court of Appeals "or from directing the trial court to determine whether a new trial should be granted."

In this case, Judge Stuart had already determined that a new trial should be granted and under these circumstances, the Court of Appeals was entirely correct in ordering a new trial.

In fact, the Court of Appeals in effect merely corrected the mistake that it had made on plaintiff's Petition for Writ of

Mandamus in *Peterman v. CRI&P RR. Co.*, 493 F.2d 88, where it held that Judge Stuart did not have the power to order a new trial. This question was covered by the defendant in its Petition for Writ of Certiorari filed herein on or about April 29, 1974 and which was denied. *Moore's Federal Practice* states, at ¶ 51.11:

> "But once the finality of the judgment has been suspended by a proper motion, which is pending and undecided, the last sentence of Rule 59(d), added in 1966, makes it clear that after giving the parties notice and an opportunity to be heard, the trial court has the power to grant a new trial, on its own initiative, more than 10 days after the entry of judgment for any reason for which it might have granted a new trial on motion of a party."

To the same effect was the holding of Judge Weiner in *Slaughter, supra*:

> "Although the instant situation is not the precise one which the 1966 amendment to Rule 59(d) sought to remedy, it is one for which Prof. Moore's paragraph, cited with approval of the Advisory Committee on Rules, holds a decided view. In line with the position taken in the treatise and now written into the Rule, Prof. Moore states:
>
> > 'the trial court may respond to a motion for judgment n.o.v. by granting a new trial instead, even after ten days have elapsed from entry of the judgment.' "

The situation has now arisen which Justice Burger contemplated in his dissent in *Jackson v. Wilson Trucking Corp., supra.* In that case Justice Burger pointed out that to deny the Trial Court the right to grant a new trial in these circumstances, but to allow the Court of Appeals to grant it, would only lead to a circuitous result. Justice Burger stated:

> "The majority holding reinstates the appellant's jury verdict. If the appellee hereafter appeals from the denial of

his motion for judgment n.o.v., this court must then determine whether the evidence is legally sufficient to sustain the verdict. In that posture this court could then (a) affirm the lower court's denial of the motion for judgment n.o.v., allowing judgment on the verdict to stand, or (b) reverse the order denying judgment n.o.v. and remand for entry of judgment on that motion, or (c) remand under 28 U.S.C. § 2106 for a new trial, if such action be considered 'just under the circumstances'.

'As final judgment follows either action under (a) or (b) above, our self-imposed limitations will have effectively precluded exercise of any discretion by the court best equipped to do so. If, under (c) above, we remand for a new trial, it is only after needless delay and expense that we have accomplished precisely what the trial court attempted to do in the first place.

"* * * Rule 59(d) is directed at cases where no litigant makes a motion of any kind, but when the court thinks the record does not support the verdict. In such case the trial court, without any motion *of any kind*, is for a 10 day period given power sua sponte to grant a new trial. It is only the sua sponte which has a time limit. Rule 59(d) was not intended to apply to a situation where a motion for judgment n.o.v. is made, since as I have pointed out it rarely if ever that a motion can be made and heard within the time limit. Furthermore, once the finality of a judgment has been suspended by a timely motion for judgment n.o.v., as occurred here, there is no sound reason why the time limitation imposed by Rule 59 should apply. 7 Moore's Federal Practice 3851, 3872-3 (2d ed. 1952)."

Defendant asserts that the Trial Court had the right and duty to order a new trial in the first instance, as it did. Clearly the Court of Appeals had that right.

CONCLUSION

1. Plaintiff asserts that defendant should have appealed from Judge Stuart's original Order denying its motion for judgment n.o.v., but granting a new trial, notwithstanding the fact that that was not an appealable Order. He urges that more than one year passed from that Order to defendant's appeal on the merits, but overlooks the fact that Rule 60(b)(6) allows appeal from a final judgment beyond the one year limit for "any other reasons justifying relief from the operation of judgment."

2. Plaintiff asserts that as defendant's Notice of Appeal was filed more than thirty days after the issuance of the mandate by the Court of Appeals in the mandamus action, that its appeal was not timely, but overlooks the fact that Judge Stuart specifically granted defendant the right to appeal within the second thirty-day period for excusable neglect, as allowed by the Rules.

3. Plaintiff asserts that the Court of Appeals had no power to grant a new trial, although such power is plainly allowed by the Rules, and in the event certiorari is granted in this case, this Court should hold that the decision of the Court of Appeals for the Eighth Circuit in the mandamus action (493 F2d 88) was erroneous and that Judge Stuart did have the right to grant a new trial in the first instance.

In one of his post-trial Orders, Judge Stuart referred to this case as "as procedural headache", which has largely been caused by the plaintiff's filing of spurious and repetitious post-trial motions.

A new trial has now been granted "in the interest of justice", as Judge Stuart ordered in the first instance. This Court

should not be burdened with this matter and the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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